Supreme Court of the United States

October Term, 1950

No. 217

ORVILLE COLLINS, H. D. BURKHEIMER, STANLEY LORD, JAMES E. DOGGETT and RALPH BAKER,
Petitioners,

vs.

HUGH HARDYMAN, MRS. EMERSON MORSE, MRS. TOSCA CUMMINGS and MRS. MABLE PRICE,
Respondents.

BRIEF FOR THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS *AMICUS CURIAE.*

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The National Association for the Advancement of Colored People submits this brief as *amicus curiae.* The written consent of all parties to the case to the filing of this brief has been filed with the Clerk of the Court.

Statement of Interest.

For more than forty (40) years, the National Association for the Advancement of Colored People has worked unceasingly to foster those political, social and economic conditions in which no individual's opportunity can be limited by race, religion, national origin or ancestry.

To this end, the N. A. A. C. P. has enlisted every legitimate measure—including all legal, political and educational means that can be employed. In a struggle against prejudice, it has recognized that only in a free political and public forum can orderly change be effected in society. Therefore, it has fought for freedom of expression for individuals and groups, in and out of the political process. It has fought for this freedom even for those with whom it disagrees, for it realizes that free communication is indispensable to responsive, responsible government, and antecedent to any change. Free expression, it believes, is choked off as effectively by mob intolerance and violence as by state action.

The N. A. A. C. P. believes that there is a sphere of essential freedom, which the federal government can and must protect, on which the survival of free society hinges, and that certainly to assemble and petition for grievances is within that sphere. It further believes that the Congress so intended, and that that fact is demonstrated in respondents' brief and the opinion of the Court below. However, as a friend of the Court, it would like to perhaps emphasize some matters already alluded to therein and to briefly discuss some points of law which it submits should lead to affirmance of the judgment below.

The opinion below is reported at 183 F. 2d 308.

I.

Section 47(3) covers the action of private persons who infringe certain constitutionally granted rights.

Petitioners and the dissenting opinion below deny that Section 47(3) applies to private persons. They contend that the word "persons" in the statute does not mean "persons" as that word is customarily understood, but

that it is narrowly limited in meaning to "governmental agencies or officials".

In construing a statute, we "assume that Congress uses common words in their popular meaning, as used in the common speech of men * * * " (FRANKFURTER, "Some Reflections on the Reading of Statutes", 47 Col. L. R. 527, 536 (1947)). However, when ambiguities occur, we employ various devices to determine the meaning of the legislature, or if that task proves impossible, under the fiction of determining legislative meaning, we assign a meaning most appropriate under all the circumstances.

For purposes of this case, it seems that no one could question the meaning of "persons", as any ambiguities which the word conjures are in a realm not here relevant—*i. e.*, whether the definition includes certain juristic and artificial entities. Nevertheless, we propose to subject the term "person" to any conceivable analysis to demonstrate that in this case it has no peculiar meaning:

A. General Congressional Definition.

In 1871, *the identical year in which what is now Section 47(3) was passed,* Congress also passed a definition statute, defining, among other things, the word "person". That this was a well considered statute is demonstrated by its gradual formulation during the preceding seven (7) years. In 1864, a manufacturing statute (13 Stat. 258) defined "individual" and "person" by including within the terms such entities as "partnerships, firms, associations * * * corporations". In 1866, a tax law (14 Stat. 163) made a similar definition, adding "bodies corporate or politic".

In 1868, another tax statute (15 Stat. 166) made a similar definition. 1871 marked the appearance of the first general definition of "person". It is to be noted once more

that this definition was passed shortly before the passage of the section we now construe. It stated:

> "* * *
>
> "Sec. 2. *And be it further enacted,* that in all acts hereafter passed * * * the word 'person' may extend and be applied to bodies politic and corporate, and the reference to any officer shall include any person authorized by law to perform the duties of such office, unless the context shows that such words were intended to be used in a more limited sense * * *" (16 Stat. 431).

It is also to be noted that Congress did not conceive "officers" and "persons" to be identical, but saw fit to define each separately.

B. No Contrary Specific Definition.

Sometimes, Congress, within a statute, defines the meaning of words used therein. No such definition appears in 47(3). Surely, if another meaning were intended, in view of the common definition of "person", the general definition statute quoted above, internal contradictions which result from petitioners' definition (see the opinion of the Court below, p. 311), and the Congressional practice of providing definitions for particular statutes—surely, a specific definition for purposes of this section would have been provided.

C. No Internal Evidence That Word Is Being Used in Unusual Sense.

All indications from the statute are that "person" means "person" as that word is commonly understood. The same considerations applicable in the discussion of Point "B" above are relevant here. The internal evidence upon which petitioners rely is that the word "equal" some-

how indicates that only the state is capable of causing culpable deprivation. By definition, privileges or immunities bestowed by the national government must be equally distributed. They cannot be enjoyed by some, and not by others. Therefore, any deprivation of a privilege or immunity must be the deprivation of an "equal" privilege or immunity. The word "equal" here merely emphasizes the solemn importance of the activities which are protected. An individual who suppresses one of these essential freedoms assails an "equal" privilege and immunity to the same extent as does a state officer. Because government bestows equality does not mean that only government can take it away.

Petitioners and the dissenting opinion below attempt to back into an unusual definition of "person" by reliance upon a jurisprudential theory of who may grant rights and who may deprive them and their exercise. Granting, *arguendo*, the correctness of the concepts relied upon, at most, we find ourselves with a statute which presents certain internal contradictions. The meaning of the statute then must be resolved in terms of the various probabilities presented heretofore, and below, and in the light of considerations of public policy, as discussed more fully below.

D. The Customary Congressional Usage.

We have examined the customary use to which Congress put the word "person" before and at the time of the passage of 47(3). Since then Congress has defined "person" scores of times never suggesting that "person" means government official and only government official. At the very outset of the United States Code Annotated, Section 1 states:

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise * * *

> "The words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies and joint stock companies, as well as individuals. * * * 'officer' includes any person authorized by law to perform the duties of the office. * * *" 62 Stat. 859.

Again note the recognized non-identity of "person" and "officer".

Throughout the Code definitions are similar. 2 U. S. C. A. Section 261(c) states:

> "The term 'person' includes an individual, partnership, committee, association, corporation, and any other organization or group of persons." 60 Stat. 839.

5 U. S. C. A. 1001(b) states:

> "'Person' includes individuals, partnerships, corporations, associations or public or private organizations of any character other than agencies. * * *" 62 Stat. 99.

6 U. S. C. A. 15 provides:

> "* * * The term 'person' in this section means an individual, a trust or estate, a partnership or a corporation. * * *" 61 Stat. 646.

The following sections are in accord: 4 U. S. C. A. Section 110; 6 U. S. C. A. Section 618; 7 U. S. C. A. 242, 504, 608a (9); 15 U. S. C. A. Section 80a-2, 80b-2, 431, 715a, 717a, 901, 1127; 16 U. S. C. A. Section 631a, 690h, 721, 796, 851; 21 U. S. C. A. Section 171, 188a, 321; 22 U. S. C. A. Section 611; 26 U. S. C. A. Section 145, 894, 1426, 1532(i), 1607(k), 1718, 1805, 1821, 3124, 3507, 3710(c), 3793(b), 3797; 29 U. S. C. A. Section 152, 203; 33 U. S. C. A. Section 466a; 35 U. S. C. A. Section 42c; 41 U. S. C. A. Section 52, 103;

42 U. S. C. A. Section 1818; 46 U. S. C. A. Section 316; 49 U S. C. A. Section 1(3), 401, 902; 50 App. U. S. C. A. Section 38, 985, 1161, 1502, 1892.

E. Legislative History.

To satisfy this test, although those submitted above should more than suffice, one need only make reference to the Legislative History of 47(3) set forth in the opinion of the Court below at page 311.

F. If Ambiguity Exists, Public Policy Dictates Respondents' Construction of "Person".

It is impossible to see how any interpretation, other than respondents', of the word "person" is possible. However, if doubt exists, it should be resolved in favor of a meaning most consistent with public policy. For this proposition, the following excerpt from a leading treatise on statutory interpretation adduces ample support:

> *Section 5901:*
>
> Public policy retains a place of great importance in the process of statutory interpretation and the tendency of the courts has always been to favor an interpretation which is consistent with public policy. In fact it may be safely asserted that the bases of all the interpretative rules in regard to strict and liberal interpretation are founded upon public policy in one form or another. Although public policy, in the abstract, is a vague and indefinite term incapable of accurate and precise definition, it often serves as a concise expression for a combination of factors which exercise a tremendous influence in the formation interpretation, and application of legal principles. * * *
>
> In its strict sense public policy reflects the trends and commands of the federal and state constitutions, statutes and judicial decisions. In its broad sense public policy may be traced to the current public

sentiment towards public morals, public health, public welfare and the requirements of modern economic, social and political conditions.

It will be observed that the principles of strict and liberal statutory construction are founded upon the same or cognate factors. Therefore, public policy has no separate significance in statutory interpretation, but instead, the rules of strict and liberal interpretation are expressions of public policy. However, it is natural and very common for the courts to regard policy as a separate aid to interpretation, and for that reason, it is expedient to consider here the counterparts of public policy and how they affect statutory interpretations.

Section 5902:

Constitutional legislation which is highly responsive to current demands serves as an extremely valuable source of public policy. Thus a statute is generally given a meaning consistent with its purpose or spirit which it is commonly associated with, and serves as an indicia of public policy. * * *

Section 5904:

In this country the most reliable source of public policy is to be found in the federal and state constitutions. Since constitutions are the superior law of the land and because one of their outstanding features is flexibility and capacity to meet changing conditions, constitutional policy provides a valuable aid in determining the legitimate boundaries of statutory meaning. Thus public policy having its inception in constitutions may accomplish either a restricted or extended interpretation of the liberal expression of a statute. 3 Sutherland, Statutory Construction (1943).

To a similar effect see CRAWFORD, The Construction of Statutes 1940, page 374.

The public policy of the United States relating to freedom of expression is clear. It is best set forth in those opinions of the Supreme Court which state that the presumption of constitutionality normally applicable to legislation does not apply when a civil liberty is threatened. The presumption is an outgrowth of what has been called Justice HOLMES' philosophy of "judicial laissez faire". (LERNER, *"The Mind and Faith of Justice Holmes,"* (1943), 127). That is, a choice among the infinite number of social remedies should be left almost entirely to the legislature, which responds to the electorate, not to the courts. The presumption, therefore, means that there is a wide area in which the authority of the legislature will be upheld, even though the Court might disagree with legislative conclusions.

However, a necessary adjunct to the theory of the loosely fettered legislature is that it shall be subject to political restraint. For this it is necessary to have an electorate capable of exerting the corrective force. Therefore any impairment of the effectiveness of the electorate is viewed more carefully by the Court. To this effect see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. 4; *Thornhill* v. *Alabama*, 310 U. S. 88, 95; *Thomas* v. *Collins*, 323 U. S. 516, 530; *Bridges* v. *California*, 314 U. S. 252, 262-263; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639. "The underlying theory of the court appears to be that if, by striking down interferences in respect to matters of the mind, it can keep the market place of ideas open and the polling booths accessible, it will rely upon the ordinary political processes to prevent abuse of power in the regulation of economic affairs." (DOWLING, *Constitutional Law*, 1946.)

Mr. Justice FRANKFURTER, concurring in *Kovacs* v. *Cooper*, 93 L. Ed. 379, 387 (1943), discussed the line of

opinions which have asserted that freedom of speech deserves at least a "preferred" position under the First and Fourteenth Amendments. Although he rejects as misleading such terminology as "preferred position" or "presumptively unconstitutional", he apparently joins in this rationale of the cases:

> "The philosophy of his opinions on that subject arose from a deep awareness of the extent to which sociological conclusions are conditioned by time and circumstance. Because of this awareness Mr. Justice Holmes seldom felt justified in opposing his own opinion to economic views which the legislature embodied in law. But since he also realized that the progress of civilization is to a considerable extent the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other beliefs, for him the right to search for truth was of a different order than some transient economic dogma. And without freedom of expression, thought becomes checked and atrophied. Therefore, in considering what interests are so fundamental as to be enshrined in the Due Process Clause, those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. Accordingly, Mr. Justice Holmes was far more ready to find legislative invasion where free inquiry was involved than in the debatable area of economics." *Kovacs* v. *Cooper, supra.*

Attorney General, now Mr. Justice Clark, stated the same policy somewhat differently in a recent article:

> "Our democracy suffers a grievous, if not a fatal, blow when the processes of law and order are broken down by mob violence. The federal government must not stand idly by when a few reckless men in a com-

munity disclaim their obligation to society and, flouting the priceless heritage of equality of all men, undertake to substitute lynch law for due process of law. (CLARK, "A Federal Prosecutor Looks at the Civil Rights Statutes", 47 Col. 175, 185 (1947).)

Therefore, although it is difficult to see how any serious ambiguity could exist, any uncertainties should be resolved in the direction of the preservation of free expression.

Conclusion.

The judgment of the Circuit Court of Appeals should be upheld.

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